3PB BARRISTERS

Legal Assessors' Hints and Tips on Case Preparation and Advocacy

By David Swinstead, Peter Jennings, Jane Rowley and Lachlan Wilson

3PB Barristers

The legal assessors in 3PB's Professional Disciplinary and Regulatory Team see examples of both good and bad case preparation and advocacy. They share with you here ten hints and tips from their experience.

Professional disciplinary hearings take place before bodies variously termed tribunals, committees or panels; with some regulators the legal assessor is called the legal adviser; and the advocate presenting the case for the regulatory authority is called by titles such as the case presenter or the prosecutor. To avoid repetition, we have in this article used the words tribunal, panellist, legal assessor and prosecutor.

1 Get moving and prepare early

- For whichever side you act look at the case critically, and in detail, at an early stage and get the case preparation moving. Particularly where there is a multiplicity of charges, it can sometimes be quite late at the substantive hearing itself that it is eventually realised that the evidence in support of a head or sub-head of charge is not in order. A more pro-active approach should avoid this.
- If you are defending, early preparation will be constrained by how early you are instructed. Do not just prepare for the response to the initial referral or to the investigative proceedings, or for the upcoming interim orders hearing. Begin to put your own case together with a view to the potential substantive hearing. A bundle of remediation evidence, for instance, will impress the tribunal more if it shows efforts to improve beginning from when the original mishap occurred. It will be better if being mentored by another experienced practitioner who can advise on apparent problems with technique, has been arranged on the registrant's own initiative rather than in response to interim requirements imposed by the regulator or by a public body such as the NHS. The remediation evidence will impress much less if it comprises certificates for a lot of online courses starting a fortnight before the final hearing.

2 Remember your place

- No, we don't mean calling people sir or madam. We mean remembering that you are taking part in professional disciplinary proceedings. Practitioners often have a background in either the criminal or the professional negligence field. Disciplinary hearings are neither: they are public law proceedings with their own character and rules.
- As the court pointed out in Solicitors Regulation Authority v Davis [2011] EWHC 232 (Admin), disciplinary proceedings do not fit comfortably into the categories of civil and criminal proceedings. They are not criminal proceedings, but neither are they ordinary private law civil proceedings. They do not arise as a result of a disagreement about civil rights between two private parties.
- Keep in mind, among other things, that the factual paragraphs of the allegation are not like the counts in a criminal indictment: they are the factual narrative on which the charge of impairment/misconduct is based. Similarly, beware of challenges to the jurisdiction on the ground that the events took place overseas. Look it up and you will probably find that the tribunal does have jurisdiction. If the case is based on matters for which the professional was acquitted in a criminal court, double jeopardy is unlikely to arise. There *could* be an abuse of process argument, but it will require a lot more than the mere fact of acquittal.
- Conversely, there is generally little mileage in arguing procedural or evidential issues by appealing to the "civil way" of doing things. Disciplinary tribunals have their own procedural and evidential rules. The Civil Procedure Rules do not apply, and the civil law of evidence will be relevant only if the rules themselves refer to it. Indeed some regulators have rules that refer to the criminal law of evidence and procedure. Also, if the issue is whether what the registrant did fell seriously below what was acceptable, it will usually be unnecessary to start by discussing whether it was negligence and then arguing how much more than negligence it needs to be.

3 Read the charges

- This sounds obvious but it is surprising how often even experienced prosecutors and defending advocates pay insufficient attention to what the charge actually says.
- As we pointed out above the factual paragraphs of a professional disciplinary allegation are not like the counts in a criminal indictment. Their drafting does not follow the words of a statute but is free text. Look at the wording for signs of a trade-off between what the regulatory authority would like to allege and what it thinks it can prove.

- Remember that where the factual charges contain sub-paragraphs, these are usually not free-standing but have to be read along with the introductory words (sometimes called the "stem"). The charge is not simply "a) did X": it is "You failed to provide an adequate standard of care in that you: a) did X". If formal admissions are made inadvertently because this is overlooked, that leaves a problem which may not be easy to sort out.
- If you are the draftsman of the charge, it will make the case run more smoothly, and lessen the risk that the hearing does not finish in the scheduled time, if you examine the charge rigorously for errors of grammar and spelling, mistakes in dates and identification (such as putting Patient/Client C when it should be Patient/Client D) and tortuous wording which will take up the time of the tribunal unnecessarily when it comes to make its decision and draft its reasons. The legal assessor may draw the advocates' attention to potential problems with the drafting but you should not rely on this.

4 Be ready for the hearing

- In most disciplinary tribunals now written witness statements are usually treated as evidence in chief, either under the rules or by virtue of case management directions. However quite extensive supplementary oral questioning is frequently tolerated. Some oral questioning in chief may be a useful way of getting the witness used to answering questions, but if important additional information is necessary a supplementary witness statement should be obtained and served in advance. That is fairer to everybody, including the witness and the tribunal.
- The remediation bundle should now be in order. In so far as it is possible with the regulator in question, it should contain, at least, one or more reflective pieces, evidence of courses undertaken, references and testimonials from fellow professionals and patients/clients, relevant audits and a Personal Development Plan (with, if possible, evidence from a number of years showing what has been achieved and new development identified). There should be appraisals, including both straightforward 360° appraisals and also the sort where the registrant's view of his or her performance in different areas is matched against the views of colleagues.
- The regulator will publish guidance for registrants, for tribunals and generally. Anticipate which pieces of guidance are likely to be needed in your hearing: offering no evidence, submissions of no case to answer and so on. Have it available, in hard copy or on your laptop as you feel convenient, so that you do not need to ask for time to look it up.
- Try to ensure that as much as possible that can be sorted out before the hearing has been. Tribunals accept that there may have to be some sorting out on the first morning of a

hearing. They are generally content to give time when they are assured that time well spent at the beginning will save time later on, but it helps to be able to tell them that efforts were made in good time in the period leading up to the hearing and the delay is not the result of leaving everything to the last moment.

- Advocates run the risk of losing the tribunal's good will if things appear to run on with no very obvious benefit. One of the jobs of a legal assessor is to ensure that the tribunal understands the reasons why time may have to be taken at the beginning of a hearing, and our intercession on behalf of the parties can make a difference if a tribunal is beginning to lose its patience.

5 Put it in writing

- If you want to get into the good books of the tribunal try to reduce your opening to writing. First, it is of a great assistance to the tribunal in understanding the way that the case is put by the regulator. It also gives the tribunal something to read if there are delays in the case starting. Finally, it gives the members of the tribunal a useful reference document.
- The same goes for closing submissions. Tribunals find it really useful to receive closing submissions in writing. If advocates want more time to prepare closing submissions at the end of the case (or the end of the factual stage), an added persuasive element is the promise of closing submissions in writing.
- While one should avoid overburdening the tribunal with supplementary documents just for the sake of it, consider also whether documents such as an evidence matrix, a chronology and an aide-mémoire of technical terms, will be helpful.

6 Be organised: timetabling and scheduling witnesses

- In principle the fewer and shorter the gaps between witnesses the better but, on the whole, tribunals are quite understanding of the problems of having witnesses available at particular times and also understand that timetables may go wrong even in the best organised cases.
- If there has to be a gap between witnesses, try to arrange something else that can usefully be done in the time. There are often incidental procedural matters which can be fitted in, or further documents to be read. Take the initiative about this: if there is to be a vacant afternoon between witnesses and you are going to produce a further 500 pages of records, avoid having to tell the tribunal that they cannot have them to read because the records have not been scanned in, or not redacted, or not yet shown to the other side for agreement.

- As the tribunal must keep in mind that things can go wrong, so must the advocate. Most cases have snags, some of them ones you have not spotted yet. Also, issues that would otherwise take time to resolve can often be dealt with by agreement with your opponent, but only if you have an opponent with whom to agree. If you are the prosecutor do not assume that a non-attending or unrepresented registrant means that the hearing will be significantly shortened.

7 Ask the question and listen to the answer

- This is elementary advice given to students of advocacy but sometimes in regulatory hearings it seems to have been forgotten or never learned, particularly in cross-examination. Avoid questions that amount to a mini-speech. If there really is a question in there somewhere it must be possible to express it, at least reasonably succinctly, as something that sounds like a question.
- The occasions when, having asked a proper question, you need to interrupt the witness' answer should be pretty rare. If you ask the right question in the first place it will be unnecessary to add a postscript when the witness has begun to answer. If the witness is plainly going on about something irrelevant and avoiding the question, you can let him finish and then repeat the question politely. The tribunal is able to spot the truly evasive witness.
- There can be occasions – they ought to be seldom - when you realise after the answer begins that your question is ambiguous or that you should have asked another question as a preliminary. In that event, if you interrupt do so apologetically: do not express it as a reproach to the witness.
- Two examples of what our legal assessors have heard will illustrate why interrupting the witness is usually unnecessary and often an indication that the wrong question was asked in the first place. The first was where a witness began to say that he was unable to remember and the advocate talked over him to tell him "If you can't remember say so". The second was where, after a very lengthy question, the witness began to answer and the advocate interrupted with "It is a simple question, the answer is either Yes or No", and then proceeded to summarise the question as two separate propositions one of which contained a double negative. This does no credit to the legal profession and is unlikely to find favour with the tribunal.

8 Take trouble with experts

- You will take care in choosing your expert and in considering the background of the other side's expert. This is not simply a matter of the expert's qualifications, status and reputation. If, for example, the case depends in part on the extent to which an NHS psychiatrist can rely on the care co-ordinator, then a psychiatrist in private practice, however distinguished, will be at a disadvantage if he last worked in the NHS at a time when the organisation of mental health services was very different from today. Also, the expert who is an acknowledged leader in his field can be a problematic witness, for instance because his standards are too demanding.
- Experts like anyone else are imperfect and will make mistakes from time to time, but there are some that particularly arise in disciplinary proceedings. The sort of errors which our legal assessors have noticed include making judgments on factual evidence which are a matter for the tribunal rather than for the expert; and simple misinterpretation of notes, such as criticising one doctor for failing to do something on an occasion when the patient saw a different doctor or the practice nurse.
- Remember that registrant panellists are not there as experts. They should not be put in a position where they are asked to explain a technical matter to the lay members, when in camera or not in session. A good registrant panellist will refuse to answer such a question and the legal assessor should make sure that this does not happen. This does mean that experts may have to explain matters in more detail than perhaps an advocate considers necessary: they should not fall into the trap of thinking that if the registrant member knows about the issue that is sufficient.

9 Be aware and be fair

- This is an important topic which is all too often overlooked.
- Healthcare professions in particular have many practitioners from overseas. Some may not be entirely at home with the English language. Do not lose sight of the need to ensure that questions are understood and that the witness is allowed to express the answer in his or her own way. This is not only a matter of fairness to the witness or registrant: it is unhelpful to the tribunal if it cannot be confident that what was said was correctly understood.
- The sort of convoluted question that ought to be avoided with any witness should particularly be avoided with a witness whose first language is not English. The same goes for the needless use of words with which the witness or registrant may be unfamiliar. Legal assessors sometimes hear the retort that it is the registrant's responsibility to have an

adequate standard of English to do the job safely. That is not an answer: someone whose English is quite adequate for their job may have difficulty with words that hardly ever arise either in ordinary speech or in the witness' professional work.

- If you are aware from the witness' answer that the question may not have been understood as you intended, it is usually better to try to clear up the ambiguity there and then. The legal assessor, or one of the tribunal, may interpose to point out an ambiguity or apparent misunderstanding, but if you as the advocate become aware of a problem you should try to deal with it yourself.
- Registrants who trained overseas may be accustomed to doing things differently from what is usual in this country. If you are defending, the significance of this for how you put your case has to be considered carefully. It is possible, for example, that there is nothing wrong with what the registrant did: it is just different from what people are used to doing here.

10 Handle with care

- Part of the job of the advocate is judge management. Chairs and panellists come with different personalities, some relaxed and easy going, others anxious and what one might call "high maintenance".
- Most Chairs are extremely competent and manage hearings with great skill. The more experienced the Chair the greater the likelihood that the hearing will run relatively smoothly. Some have a great gift for making the witnesses and advocates feel relaxed and comfortable and the hearing proceeds without incident. Occasionally there may be a Chair who requires "handling".
- Tribunals are not that concerned about hearing often multiple applications at times in a case, because they will feel that, at least, they are doing something to get the case moving. They will assiduously consider every application that is put in front of them. However, even they will begin to baulk if they feel that they are receiving ill-conceived or pointless applications. As in any jurisdiction, thought should be given to whether a particular application will advance that party's cause.
- If the tribunal asks for something, try to provide it. It is not that a refusal will cause them to take offence, but that the fact that they ask means that they are troubled by the absence of the document or information. If it is not provided their misgivings are unanswered.
- If you are not familiar with some procedure, look up the rules and any relevant guidance. For instance if the rules provide a list of procedural directions which the Chair or the tribunal may give at a preliminary hearing, come prepared for it to do that. Don't tell the

tribunal, off the top of your head, that it only has jurisdiction to consider the point that you want it to decide.

- One hopes that the legal assessor will be the advocates' friend in helping to ensure that the hearing runs as smoothly as possible under the circumstances. If real difficulties arise, seek the assistance of the legal assessor in trying to resolve any problem.

This document is not intended to constitute and should not be used as a substitute for legal advice on any specific matter. No liability for the accuracy of the content of this document, or the consequences of relying on it, is assumed by the authors. If you seek further information, please contact the 3PB clerking team.

22 January 2021

David Swinstead

Barrister
3PB

0330 332 2633
david.swinstead@3pb.co.uk

3pb.co.uk

Peter Jennings

Barrister
3PB

0330 332 2633
peter.jennings@3pb.co.uk

3pb.co.uk

Jane Rowley

Barrister
3PB

0330 332 2633
jane.rowley@3pb.co.uk

3pb.co.uk

Lachlan Wilson

Barrister
3PB

0330 332 2633
lachlan.wilson@3pb.co.uk

3pb.co.uk